Michigan Taxonomy of Alternative Dispute Resolution Processes

This is a brief survey of alternative dispute resolution (ADR) processes which can be found in various Michigan trial courts. Since most current discussions revolve around applying the most appropriate ADR process to particular cases, the discussion is organized by ADR process, and not by particular court projects.

All processes outlined below have been or are currently utilized in Michigan, although not in all courts, and in varying degrees. One key dynamic driving the ADR discussions is that nationally, approximately 97% of all civil matters settle prior to trial. Knowing this, policy makers, judges, lawyers, and citizens are concluding that since such a preponderance of cases settle, it is in the best interests of the parties and courts (and thus the public) to discover how best to promote just settlements as early as possible.

The following discussion is a "taxonomy" of processes which might be used to help parties resolve matters short of formal adjudication by a court. The processes are:

Conciliation
Mediation
    Michigan Court Rule 2.411
    Community Dispute Resolution Program
    Friend of the Court Mediation
Early neutral evaluation
Arbitration
Case Evaluation (Michigan Court Rule 2.403)
Med/Arb
Domestic Relations Mediation (Michigan Court Rule 3.216
Domestic Relations Arbitration
MiniTrial
Summary Jury Trial
Settlement Day [Week]

Effective August 1, 2000, MCR 2.410 permits judges to order parties in general civil and domestic relations matters to attempt an ADR process once the court has adopted a local ADR plan. Under the new rules, parties are encouraged to agree to their own ADR provider and process, however if they cannot agree, the court may designate the ADR process and appoint a provider from the court roster. MCR 2.411 governs the mediation of general civil matters; MCR 3.216 governs the mediation of domestic relations matters.

Michigan Taxonomy of ADR Processes

Conciliation

Process description: The least formal of all ADR techniques, conciliation is merely the facilitation of communication between two or more parties by a neutral third-party. The process assumes a mutual and collaborative effort on the part of the disputants to work toward the resolution of their dispute. In many instances, conciliation may be by telephone or through correspondence. The main feature distinguishing conciliation from the mediation process is conciliation's lack of formal process. Conciliation may also be thought of as the particular technique a judge may use in settlement tele-conferences, exploring with parties alternatives to taking matters to trial.

Timing: Pre-filing through appeal

Example: In late 1996, the Third Circuit, working with attorneys from the Detroit Metropolitan Bar Association, Wolverine Bar Association, and other bar groups, engaged in an eight-week initiative to bring early resolution to the estimated 10,000 cases filed over the typical filings in the first quarter 1996 as a result of tort reform. The purpose was to "bring the parties together, early in the process, with minimal costs and using a special rapid discovery procedure, to try to reach settlement." At these brief sessions, a single attorney or judge met with parties to facilitate settlement. Twelve cases were set each day with each attorney or judge. Attorneys and parties themselves attended the sessions with the expectation that facilitating settlement discussions early in the dispute would result in more resolutions.

The traditionally used settlement conference [which may also be known as a pre-trial conference, or any other conferences in which settlement discussions are held] is less a dispute resolution technique than it is an opportunity to 1] attempt resolution of portions of or the entire dispute, and 2] determine the appropriateness of any of the other ADR techniques. Settlement conferences vary considerably in nature, with some judges taking the initiative to discuss settlement very early in the litigation cycle, and other judges reserving settlement discussions until just before trial. The ADR technique associated with settlement conferences is conciliation, with a judge serving to identify points of mutual agreement, reality-test attorney and party assumptions, and underscore advantages to resolution short of trial.

Conciliation is frequently employed in judicial settlement conferences, although unlike the Third Circuit project, the disputants themselves are not present. A formal process is generally not followed, as in mediation.

Mediation

Mediation is essentially an extension of the negotiation process, and is more formal than conciliation. As in direct negotiation and conciliation, the parties control the substance of the discussions and any agreement reached. A typical mediation session begins with setting groundrules which will govern the course of discussions. Parties are encouraged to make opening statements, and thereafter the third-party neutral assists the parties in identifying and clarifying the issues in dispute, generating options for resolution, reality-testing the various options, and assisting the parties in crafting a settlement statement.

The mediator serves to schedule and structure negotiations, acts as a catalyst between the parties, focuses the discussions, facilitates exchange between the parties, and may serve as an assessor--but not a judge--of the positions taken by the parties during the course of negotiations. In most instances, and unless parties otherwise agree, all statements made in the mediation process are confidential.

Mediation is appropriate in many circumstances, especially those where parties have reached or anticipate a negotiation impasse based on, among other factors, personality conflicts, poor communication, power imbalances, multiple parties, or inflexible negotiating postures. Mediation is the most flexible ADR mechanism, inasmuch as it can be tailored by the parties to best assist their future negotiations.

The hallmark of conciliation and mediation [and community dispute resolution, discussed below] is that they are collaborative processes involving the direct participation of the disputants to arrive at their own resolution of the dispute. No determinations or decisions are made by third-parties affecting the outcome of their dispute. All remaining ADR techniques outlined in this Taxonomy incorporate adversarial processes in which parties do not work together to reach settlement, but rather seek a binding or non-binding assessment or determination of the dispute from a third-party.

Note: MCR 2.411, effective August 1, 2000, outlines considerations courts must address if they will be ordering litigants to attempt to mediate their disputes. Mediators serving on court rosters must have completed training requirements established by the State Court Administrative Office.

Timing: Pre-filing through appeal

Examples:

Probate courts: Contested adult guardianships can be referred to mediation. Instead of families presenting several days of proofs to a judge, a trained mediator meets with all interested parties to discuss the need for and scope of guardianship.

Victim/offender mediation. As a diversion process in some courts, or as a condition of probation in others, juvenile offenders are invited to meet with victims to intimately learn the consequences of their actions and to reach agreement on the type of restitution (financial

or community service) to be made in lieu of coming under the court's supervision. Post-petition, as a part of probation, juveniles negotiate restitution with victims interested in meeting with their perpetrators.

District courts: By far the most frequent user of mediation services, approximately one-half of all district courts claim to refer some level of cases to Community Dispute Resolution Program Centers. And slightly over one-half of all cases referred to CDRP centers are from courts. District court cases, including small claims are particularly amenable to mediation; there are few legal issues involved, the emotional stakes may be high, and routinely parties have on-going relationships. Many courts, in notices of hearing, include a letter encouraging disputants to take advantage of their local CDRP center prior to their trial date.

Circuit court: Until recently, circuit courts have employed MCR 2.403 case evaluation almost exclusively as the ADR tool of choice. With increasing numbers of private ADR service providers available and increasing awareness of the advantages of individual ADR techniques, more judges are strongly urging disputants to consider reaching resolution via mediation. As of January, 2001, most metropolitan courts were in the process of creating Local ADR Plans required by MCR 2.411 to begin ordering persons to attempt an ADR process.

Court of Appeals: Formally commenced in January, 1998, the Court of Appeals Settlement Office uses staff attorneys and outside mediators. Participation is mandatory, but settlement is voluntary. All cases must meet certain screening criteria.

Community Dispute Resolution Program [MCL 691.1551]

Community Dispute Resolution uses both conciliation and mediation to assist disputing parties reach their own resolutions to disputes. While the conciliation and mediation processes are essentially the same as those mentioned above, community dispute resolution can be easily tailored to handle on-going neighborhood disputes and disputes involving many members of a community. In contrast to the mediation of tort claims or major contract disputes which may last many hours, community dispute resolution offers courts referring appropriate cases a free or low cost mediation process generally taking from one to two hours using community volunteers as mediators.

Timing: pre-filing through appeal

Example: The 25 CDRP centers currently funded handle many dispute types including landlord/tenant, commercial, business dissolutions, land use, public policy issues, Americans with Disabilities Act disputes, contested adult guardianships, agricultural disputes, and virtually any case filed in district court, plus complex neighborhood disputes. Approximately 3,500 disputes involving nearly 10,000 citizens are resolved annually through the centers. Sixty-day follow-up indicates that approximately 90% of the agreements reached are kept. Nearly half of all the cases are referred from chiefly district courts, although an increasing number of circuit courts are referring non-assaultive PPO issues, land use, and post-judgment domestic relations matters. Specialized mediation services

are available through adjunct Agricultural and Special Education Mediation Programs, and mediation is currently being pilot-tested in permanency planning matters in the family division of 13 circuit courts.

Friend of the Court Mediation (MCL 552.513)

Friend of the Court offices are required to provide, either directly or by contract, mediation services. Parties must voluntarily agree to participate in FOC mediation. The process typically involves domestic relations litigants meeting with an employee of the FOC for single 1 to 2 hour session in an attempt to resolve disputed issues. The mediator is required to meet certain educational and training requirements, act as a neutral and maintain confidentiality of communications. If the dispute is resolved, a consent order is prepared. If no agreement is reached, the case proceeds to investigation and/or hearing.

Timing: Case filing through post-judgment

Example: Parties are to be advised of the availability of mediation whenever there is a dispute regarding custody or parenting time.

Domestic Relations Mediation [MCR 3.216, Effective August 1, 2000]

This court rules affords litigants with two processes: mediation, and evaluative mediation. Mediation under this rule is essentially the same as mediation discussed above. "Evaluative mediation," however, offers parties the option of having a willing mediator offer proposed settlement terms for any issues which the parties themselves have been unable to resolve. Parties must specifically request this process, and they are not bound by any recommended terms provided by the mediator. The proposed settlement terms are not revealed to the court, and there are no sanctions for rejecting the mediator's proposed settlement terms. Parties may be ordered to attempt mediation, and mediators appearing on court rosters must meet training standards established by the State Court Administrative Office. Mediators serving on court rosters must have completed training requirements established by the State Court Administrative Office.

Timing: pre-filing through trial

Early Neutral Evaluation

Early neutral evaluation is a process in which parties obtain an assessment of their case from a neutral private attorney expert in the substance of the dispute. This process can provide the parties an alternative to extensive discovery. It can also be useful in resolving complex scientific or technical issues where the presentation of proof on the issues is very difficult, expensive, and time-consuming, and where the parties may disagree significantly on the value of their case. An effective early neutral evaluation results in clarification of the issues and the development of a case management plan.

As an informal and non-binding process, the parties select a neutral third-party to investigate issues and to submit a report. Each side presents the factual and legal bases for its position, which are then discussed among the parties and the neutral. The primary purpose of the discussion is to identify areas of agreement and disagreement in the case and to identify key issues. The neutral may help the parties devise a discovery or motion plan and may explore settlement possibilities. Parties must agree whether during the time period specified for early neutral evaluation, litigation activities, such as serving interrogatories, taking depositions, or filing motions will be suspended.

At this early stage of the case, before much discovery has taken place, the case may not be ready for settlement. If settlement discussions are appropriate, however, the neutral may also act as a mediator, assisting the parties toward a mutually satisfactory resolution.

Timing: pre- or early discovery throughout discovery

Example: Although popular in some states, this process is not frequently used in Michigan; most ADR techniques in Michigan are offered late or post-discovery.

Case Evaluation [MCR 2.403]

In Michigan, case evaluation is a process through which a panel of attorneys not involved in the dispute hear issues specified by the parties, and then render a monetary evaluation of the case. Unlike any other dispute resolution technique outlined in this document, penalties may attach for not accepting the outcome of this process; failure to receive a more favorable trial verdict than the evaluation results in penalties to the party rejecting the evaluation.

MCL 600.4901-600.4969 mandates referral of tort cases to this process.

A growing concern with this process, however, relates to the quality of the procedure from the clients' standpoint. Case evaluator affiliation (an attorney serving as a plaintiff representative one week, as a neutral the next week), qualification (how well can the attorneys on the panel actually evaluate the case), and lack of training and evaluation are all perennial concerns.

This process is statutorily required of tort cases, but is frequently ineffective when disputes involve many parties or embody complex issues such as asbestos cases.

Timing: no earlier than 91 days after the filing of the answer through pre-trial, although typically the evaluation session is scheduled post-discovery and immediately prior to trial.

Example: The Mediation Tribunal Association, the non-profit entity which processes cases for the Third Circuit Court, handles approximately 12,000 cases per year. Attorneys hear 6-20 cases per day, providing evaluations for parties. Approximately 20% of the parties participating in the evaluation accept the awards within 28 days; all the remaining continue on the trial calendar.

Arbitration [MCL 600.5001-600.5035; MCR 3.602]

Arbitration typically is a private, voluntary process in which a neutral third-party, usually with a specialized subject expertise, is selected by the parties to render a decision that is binding. Each party has the opportunity to present proofs and arguments at the arbitration hearing. Unlike the "Michigan mediation" process, awards are often supported by a reasoned opinion.

The role of the neutral to render a decision and the absence of facilitated settlement discussions between the parties differentiate this process from mediation.

Implementing statutory arbitration (MCL 600.5001-600.5035 and MCL 600.5040-600.5065), MCR 3.602 requires a party to file a complaint to either compel or stay arbitration other than in a pending action, or to file a motion to compel or stay arbitration in pending actions.

Example: Usually, if a contract/agreement has an arbitration clause, the only action a court might take is to decline jurisdiction and order parties to arbitration.

Med/Arb

This dispute resolution process begins with the neutral third-party facilitating settlement discussions as a mediator, however in instances of unresolvable impasse, the third-party becomes an arbitrator at the request of the parties, and renders an award and findings.

Timing: Post-discovery

Example: This process, while used with increasing frequency in some states, appears to be rarely used in Michigan.

Domestic Relations Arbitration [MCL 600.5070; Effective January, 2001]

Under this new statute, parties may stipulate to binding arbitration conducted by an attorney following acknowledgment on the record that parties have been informed that arbitration is voluntary, the award is binding, and the right of appeal is limited. A court may not order this process without the parties having agreed to submit their matter to binding arbitration through a written agreement to arbitrate. Unlike domestic relations mediation, in which the parties themselves generate options for resolving differences, an arbitrator renders an award governing the matters pre-determined by the parties in their arbitration agreement. Arbitrators must be attorneys with 5 years experience in domestic relations; there are no training requirements to serve as an arbitrator.

Timing: pre-filing through trial

Minitrial

The minitrial is a private, consensual proceeding where the lawyers for both parties make shortened presentations of their cases before the persons with settlement authority for each side and, often, a neutral third-party adviser. After one or two days of presentations, the principals try to settle the underlying dispute. The neutral adviser provides potential rulings on the legal, factual, and evidentiary issues likely to be encountered if the dispute was to proceed to trial. If the parties are unable to reach agreement, the adviser also renders a non-binding opinion as to how s/he expects a court to decide the overall case. Disputants then try again to reach a mutually acceptable agreement.

Timing: early to post-discovery

Example: Although rarely used in Michigan, it continues to receive much attention in the national literature as being helpful in the settlement of large complex cases.

Summary Jury Trial

The summary jury trial (SJT) is the jury equivalent of a minitrial. During this one-day process, six jurors selected from the regular jury panel hear one-hour presentations by attorneys for the parties. Objections are limited and jury instructions are abbreviated. The jury is encouraged to reach consensus on a verdict, however jurors may also anonymously state their findings on liability and damages and thereafter discuss the case with the attorneys. The verdict is advisory, but becomes the starting point for settlement negotiations among clients and lawyers.
Timing: case ready for trial

Example: While there were some early successes with the process, particularly in Kalamazoo and Oakland Counties in the mid-1990's the process has not been widely used across the state.

Settlement Day [Week]

Less a "technique" of ADR than an ADR management tool, "settlement day" results from a court's suspending normal trial activity and, assisted by bar groups and volunteer lawyers, devotes itself to the mediation of long-pending civil cases. The idea, drawing heavily from mediation principles, is that litigants have a good chance to settle if they meet together in an informal atmosphere for the sole purpose of discussing settlement. Appropriate cases—-typically those ready for trial—-are selected and volunteer attorneys are trained in basic mediation skills. In some jurisdictions, only particular casecodes are designated for settlement day, e.g., contract cases. The mediation sessions typically last several hours; unresolved cases are returned to the court docket.

Timing: cases ready for trial

Example: A number of jurisdictions (particularly Kent and Oakland) have successfully used this process to reduce a backlog of older cases awaiting trial. While it does generally eliminate hundreds of cases from a docket in a short period of time, there have been no assessments of party satisfaction with the process.

Supplementary ADR Information

✤ Office of Dispute Resolution, State Court Administrative Office

This office serves as a clearinghouse for ADR information, oversees the implementation and evaluation of court rule and statutory ADR processes, and administers the Community Dispute Resolution Program (including the Michigan Special Education Mediation Program, Agricultural Mediation Program, and Permanency Planning Mediation Program).

✤ State Bar Alternative Dispute Resolution Section

This Section formed in 1993 to promote ADR techniques among Michigan lawyers. It provides semi-annual ADR updates, training, and materials for Michigan attorneys.

✤ Private ADR Firms

In addition to the 25 non-profit Community Dispute Resolution Program centers, there are a growing number of ADR organizations advertising services in Michigan, including Michigan Mediation and Arbitration, Inc., American Arbitration Association, National Center for Dispute Resolution, and the Mediation Tribunal Association.

✤ US District Court, Western District

Local Civil Rule 16 provides for the mediation of cases, outlines qualifications of mediators and the mediation process, and has as its goal the expansion of traditional settlement discussions and dispute resolution options.

Resources Consulted for this Compilation

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Administrative Office, 2000.

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